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**DECISION**

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

FILE: B-195963

DATE: January 10, 1980

MATTER OF: The Nedlog Company DLG03590

**DIGEST:**

1. Bid that did not take exception to any IFB requirements properly was found responsive.
2. Protest that bidder cannot perform at bid price is dismissed, since bidder was determined to be responsible, and GAO does not review affirmative determinations of responsibility except under circumstances not applicable here. Moreover, whether contract requirements in fact are met is matter of contract administration, which is function of contracting agency, not GAO.
3. Acceptance of bid that competitor argues is below-cost is not improper where bidder is determined to be responsible.

The Nedlog Company (Nedlog) protests the award of a contract to C&L Enterprises (C&L) under invitation for bids (IFB) No. DABT31-79-B-0139 issued by the Department of the Army for supplying four flavors of noncarbonated beverages, and furnishing, installing and maintaining the beverage dispensers. Nedlog first contends that laboratory tests which it initiated show that the beverages offered by C&L do not meet the IFB's specifications with respect to natural fruit juice content, and the bid therefore should have been rejected as nonresponsive. Second, Nedlog states that it has ascertained that although C&L's beverages are labeled as being sugar-sweetened as required by the IFB, they in fact contain corn sweeteners; Nedlog protests that such alleged mislabeling violates U.S. Food and Drug Administration (FDA) regulations. Finally, Nedlog questions the ability of C&L to profitably deliver even acceptable beverages at the stated bid price.

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[ALLEGATION THAT AWARDEE CANNOT  
PERFORM at Bid Price]

For the reasons set forth below, the protest is denied in part and dismissed in part.

Regarding Nedlog's first point, a bid is responsive if it represents an offer to perform the exact thing called for in the invitation. Industrial Maintenance Services, Inc., B-195216, June 29, 1979, 79-1 CPD 476. Here, the IFB's specifications prescribed a percentage of natural fruit juice per gallon of each flavor beverage. Bidders were advised to enter on the Bid Schedule the percentage of natural fruit juice in each flavor, and that a bid in which less than the prescribed percentages were indicated would be rejected as non-responsive. Since the record shows that C&L's Bid Schedule entries conformed to the percentages listed in the specifications, and the firm did not otherwise take exception to the solicitation's requirements, the bid properly was determined to be responsive. The Perkin-Elmer Corporation, B-193146, August 6, 1979, 79-2 CPD 80. Thus, the government's acceptance of the bid legally obligated C&L to supply beverages in accordance with all the terms and conditions of the solicitation. 49 Comp. Gen. 553 (1970). The protest on this issue is denied.

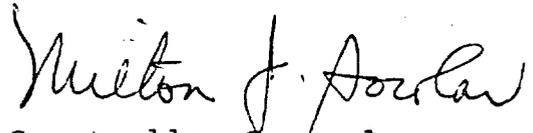
Parenthetically, we note here that the Army's report on the protest includes an analysis made early in 1979 by the FDA of the orange-flavored drink offered by C&L which shows that in that agency's view the beverage contains at least the percentage of natural fruit juice indicated by the firm in its bid under the instant IFB.

With respect to whether C&L has mislabeled the items as being sugar-sweetened in violation of FDA requirements, the protester has the burden to affirmatively prove its case. Airwest Helicopters, Inc., B-193277, June 7, 1979, 79-1 CPD 402. C&L has furnished to our Office a letter from its supplier stating that sugar, not corn syrup, in fact is used as a sweetener in the offered beverages. In view thereof, we cannot conclude that Nedlog's unsupported allegation meets its burden in that regard. The protest on this issue therefore also is denied.

Nedlog's assertions concerning C&L's ability to satisfactorily perform at its bid price, i.e., to supply beverages with the required natural fruit juice content

and sugar sweetener, concern the firm's responsibility, The Charles Lowe Company, representing Tecnaval S.R.L., B-194922, B-194922.2, July 30, 1979, 79-2 CPD 63, and the contracting officer here determined C&L to be a responsible bidder. We do not review protests against affirmative determinations of responsibility unless either fraud is alleged on the part of procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. Yardney Electric Corporation, 54 Comp. Gen. 509 (1974), 74-2 CPD 376. Neither exception is applicable here. Concerning whether the contractor can so perform at a profit, we point out that even if C&L's bid was a below-cost one, this would not have provided a basis for rejection of the bid absent a finding of nonresponsibility. Defense Acquisition Regulation § 1-311 (1976); Northwestern State University of Louisiana, B-196104, October 15, 1979, 79-2 CPD 256, and cases cited therein. Thus, this portion of the protest is dismissed.

Finally, whether the beverages supplied by C&L in fact comply with the contract requirements is a matter of contract administration, which is the function and responsibility of the contracting agency, not our Office. MRCA, Inc., B-194275, August 8, 1979, 79-2 CPD 96.



For The Comptroller General  
of the United States.